IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

In re:	)	
	)	
CHARLES ROY WALKER and	)	Case No. 01-50925-JWV
DIANA SUE WALKER,	)	
	)	
Debtors.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the Trustee's Objection to Amended Exemptions filed on February 11, 2002 (Document # 24). After a hearing on April 11, 2002, at the Buchanan County Courthouse in St. Joseph, Missouri, the Court took the matter under advisement. The Court, after independent review of the relevant caselaw, is now ready to rule.[1]

The Trustee objects to the Amended Exemptions on grounds that the Debtors should not be permitted to amend their exemptions to protect an asset that was not listed on their original bankruptcy schedules and consequently was not claimed as exempt on the initial schedules. For the reasons set out below, the Trustee's Objection to Amended Exemptions is denied in part and sustained in part.

The facts can be briefly summarized[2] as follows: On October 29, 2001, the Debtors filed a voluntary Chapter 7 bankruptcy case. At that time, the Debtors failed to disclose their stock holdings in Walker Investments, Inc., a closely held family corporation ("Walker Investments"). They also failed to provide any information in the Statement of Financial Affairs about the corporation. On December 7, 2001, at the §341 meeting of creditors, the Debtors, upon questioning by the Trustee, disclosed the existence of the stock and a corporate checking

[1] This Memorandum and Order constitutes the Court's Findings of Fact and Conclusions of Law as required by Federal Rule of Bankruptcy Procedure 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), and the Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334.

[2] This summary is based on the Chapter 7 file and on the statements of the Trustee and counsel for the Debtors, inasmuch as neither party called witnesses nor adduced evidence at the hearing.

account. Debtors' counsel filed an amended Schedule B and an amended Statement of Financial Affairs on December 7, 2001, the same day as the disclosure was made to the Trustee.

Walker Investments operated a variety store until June 2000. After the closing of the store, Mr. Walker provided consulting services as an independent contractor. The Walkers at times utilized the corporate checking account for personal business – depositing funds in the corporate account and writing checks on it – even though Mr. Walker was not receiving funds on behalf of Walker Investments. Of particular interest to the Trustee at this point, the Debtors deposited $3,700.00 from Mr. Walker's post-petition earnings into the corporate account on November 9, 2001 – after the bankruptcy petition had been filed – and then promptly spent that money to pay various post-petition bills.

On December 23, 2001, the Trustee filed a Motion to Compel turnover of the stock and the funds deposited in the checking account post-petition. After a hearing on January 11, 2002, the Court ordered the Debtors to turn over any non-exempt funds that had been deposited in the corporate bank account. (The stock certificates of Walker Investments had already been turned over to the Trustee.) On February 8, 2002, the Debtors amended Schedule C to claim as exempt all of the stock in Walker Investments, pursuant to MO. REV. STAT. § 513.430 (3), with a value of $48.82, that being the amount of money in the corporate checking account on the date the bankruptcy petition was filed, and the $3,700.00 that was deposited post-petition into the corporate account, pursuant to MO. REV. STAT. §§ 513.430 (3) and 513.440.[3] The Trustee immediately filed this action objecting to the amended exemptions of stock and funds.

The sole issue remaining before the Court is whether the Debtors should be prohibited from amending their exemptions after they had failed to disclose these assets in their original petition and after the assets had been uncovered by the Trustee at the § 341 meeting.[4]

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[3]The Debtors' counsel cites as authority for the exemption of funds *In re Wick*, 256 B.R. 618 (D. Minn. 2001). However, the District Court's ruling in that case was reversed by the Eighth Circuit Court of Appeals, *see In re Wick*, 276 F.3d 412 (8th Cir. 2002), and it is therefore inapplicable. Moreover, *Wick* dealt with the post-petition appreciation of an exempt asset, and so is inapposite in any event.

[4] At the conclusion of the arguments on April 11, 2002, the Court announced that it would sustain the Trustee's objection to exemption of the $3,700.00 that was depostited in the corporate checking account post-petition. The Debtors did not have the $3,700.00 on the petition date, so it could not be exempted. At the same time, the Trustee has no interest in the $3,700.00 because it was not property of the estate; the Court understands that

DISCUSSION

Bankruptcy Rule 1009(a) permits a debtor to amend a voluntary petition, list, schedule, or statement as a matter of course at any time before a case is closed. FED. R. BANKR. P. 1009(a). As a general rule, the courts interpreting and applying this Rule have allowed debtors to freely amend their schedules, including amending their exemptions, at any time before a case is closed. *In re Yonikus*, 996 F.2d 866, 871-72 (7th Cir. 1993). This Court in *In re Hardy*, 234 B.R. 94 (Bankr. W.D. Mo. 1999), held that, absent proof of bad faith or prejudice to the creditors, amendments to property claimed as exempt should be allowed.

Bad faith entails more than a mistaken failure to list an asset. *McFatter v. Cage*, 204 B.R. 503, 507 (S.D. Tex. 1996); *In re Markmueller*, 165 B.R. 897, 899 (Bankr. E.D. Mo. 1994). It requires some form of deception or active concealment. *McFatter*, 204 B.R. at 508. Courts look to the surrounding circumstances to determine whether the debtor has acted in bad faith. *In re Clemmer*, 184 B.R. 935, 942 (Bankr. E.D.Tenn. 1995) (looking at the "totality of circumstances" surrounding the debtor's omissions).

In *McFatter*, the debtor listed his asset for the first time *nine months* after commencement of his Chapter 7 bankruptcy case, long after the trustee had learned of its existence. In remanding the case to the bankruptcy court for a factual determination as to whether the debtor's failure to claim the exemption was fraudulent or in bad faith, the District Court stated that bad faith "generally requires concealment of an asset or an exemption of which the creditors have no knowledge and thus no opportunity to investigate. It requires something more than a mistaken failure to list an asset or to claim an exemption. In sum, to have 'bad faith' there must be some form of deception." *McFatter*, 204 B.R. at 508. By contrast, in this case the Debtors disclosed their interest in and the existence of Walker Investments stock at the meeting of creditors and *on that same day* filed an amended schedule and an amended statement of financial affairs. Two months after the disclosure to the Trustee, they filed an amended Schedule C to claim the stock as exempt. Although the Debtors continued to use the corporate account after the dissolution of the corporation and after filing their bankruptcy petition, those facts – absent evidence of some

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the parties have agreed that the $3,700.00 came from Mr. Walker's post-petition earnings. *See* 11 U.S.C. § 541. The Debtors' attempted exemption of the $3,700.00 was unnecessary.

active concealment or intentional deception – do not rise to the level of bad faith necessary to sustain the Trustee's objections.

The trustee, as the party objecting to the exemption, has the burden of proof pursuant to Rule 4003(c) of the Federal Rules of Bankruptcy Procedure. It is not clear whether bad faith or prejudice to the creditors must be proven by a preponderance of the evidence or clear and convincing evidence.[5] Whatever the standard, however, it is clear that a "mere allegation by an objector of bad faith or prejudice is insufficient." *In re Kobaly,* 142 B.R. 743, 748 (Bankr. W.D. Pa. 1992). In this case, the Trustee did not present *any* evidence to support a finding of bad faith or prejudice to creditors or third parties and therefore his objection must be denied.

Although the Court is ruling against the Trustee in this case, the Court must emphasize that the operation of the bankruptcy system depends on honest reporting. "If debtors could omit assets at will, with the only penalty that they had to file an amended claim once caught, cheating would be altogether too attractive." *Yonikus,* 966 F.2d at 872. This Court does not intend to make cheating or dishonesty either attractive or inconsequential; however, if no evidence is offered to prove that debtors acted in bad faith by intentionally concealing assets, the Court must favor the liberal application of allowing amendments to exemptions as required by the plain language of Bankruptcy Rule 1009(a). Therefore, it is

ORDERED that the Trustee's Objection to Amended Exemptions (Document # 24) be and is hereby DENIED as to the stock of Walker Investment, Inc., and SUSTAINED as to the exemption of the $3,700.00 in post-petition earnings.

SO ORDERED this 24th day of April, 2002.

/s/ Jerry W. Venters
United States Bankruptcy Judge

A copy of the foregoing mailed electronically or conventionally to:
Paul D. Blackman
Bruce E. Strauss

[5] *See Arnold v. Gill* (*In re Arnold*), 252 B.R. 778, 784 n.10 (B.A.P. 9th Cir. 2000).